KOK & CO TAX SERVICES SDN BHD

v.

EASTWAY ENGINEERING SDN BHD

HIGH COURT MALAYA, SHAH ALAM
ZALEHA ZAHARI J
[COMPANIES (WINDING-UP) NO: MT3-28-185-2002]
1 JUNE 2003

CIVIL PROCEDURE: *Trial - Solicitor - Counsel appearing in court - Whether Managing Director can act as "counsel" - Whether Managing Director has right of audience - Rules of the High Court 1980 O 5. r. 6*

COMPANY LAW: *Winding up - Locus Standi - Whether Managing Director can represent the corporate body - Whether Managing Director has right of audience - Rules of the High Court 1980 O. 5 r. 6*

The managing director of the petitioner in this case had filed an application for an order for him to appear in person on behalf of the petitioner. In reply, the respondent contended that the application was misconceived and ought to be dismissed as (i) the petitioner could not be represented by an officer of a body corporate in a court proceeding; and (ii) the managing director had no *locus standi* to file such application as, at the date of filing, the petitioner already had a solicitor on record. The issue for determination was whether the managing director had the right of audience to appear as an advocate before the court.

Held (dismissing the application):

[1] For as long as there is a counsel on record representing a body corporate, an individual is not authorized to file any application on behalf of that body corporate unless and until the counsel on record for that body corporate has been discharged. (p 207 d)

[2] Order 5 r. 6 Rules of the High Court 1980 ('RHC') expressly provides that a body corporate may not begin or carry on any such proceedings before the High Court otherwise than by a solicitor. It would therefore appear that the rule does not contemplate for a body corporate to sue "in person" nor appear "in person" as, being an artificial entity, it cannot attend and argue "personally". (p 207 e-f)

[3] According to the RHC, the right of audience before the High Court in respect of a body corporate is limited to counsel who had been instructed on that body corporate's behalf. Thus, as the law stands, the managing director of a corporate body cannot substitute his persona to that of the company of which he is a director. (p 207 f-g)

Legislation referred to:
Rules of the High Court 1980, O. 5 r. 6

For the petitioner - R Thayakugan; M/s Nadarajan & Co
For the respondent - Gurunam Singh; M/s Saran Singh & Co
For the applicant - Kok Kon Sang; In person

Reported by Izzaty Izzuddin

JUDGMENT

Zaleha Zakari J:
As evident from the heading of this winding-up petition against the respondent, Eastway Engineering Sdn, it is filed at the instance of Kok & Co. Tax Services Sdn Bhd, ("KCTS"/petitioner), a body corporate. At the time of its filing on 30 August 2002, the petitioner was represented by a solicitor, Tetuan Nadarajan & Co.

On 13 March 2003, 6 enclosures were before the court for hearing, ie, the winding-up petition itself [encl. (1)], two applications filed at the instance of the respondent [ie, the respondent's application to strike out the petition encl. (3), and the respondent's application to validate payments from two of their bank accounts [encl. (11)] and the petitioner's application to strike out the respondent's application to strike out the winding-up petition [encl. (12A)], as well as the following two applications:

(a) Kok Kon Sang's (the managing director of KCTS) application, filed on 17 January 2003, for an order for him to appear in person on behalf of KCTS in place of Tetuan Nadarajan & Co [encl. (17)]; and

(b) Tetuan Nadarajan & Co's application, also filed on 17 January 2003, for leave to have themselves discharged as counsel for KCTS [encl. (18)];

With the consent of all parties I proceeded to hear encl. (18) first, followed by encl. (17), and deferred hearing the other interlocutory applications scheduled that day, as well as the winding-up petition, pending the outcome of encls. (18) and (17).

Enclosure (18)

In the supporting affidavit of the application to discharge themselves as solicitors for the petitioner [encl. (25)], counsel averred that there was a difference of opinion between them and their client, and the likelihood that the development of this winding-up petition might place them in a conflict of interest situation. They accordingly applied for an order in terms of the application.

Upon Encik Kok Kon Sang (the managing director of the KCTS), informing the court that the petitioner had no objection to their counsel's application in encl. (18), I accordingly granted an order in terms of application of the applicant.

I then proceeded to hear Encik Kok Kon Sang's application, encl. (17).

Enclosure (17)

The issue for determination in this application is whether Encik Kok Kon Sang had the "right of audience " to appear as an advocate, to make submissions and address the court on behalf of KCTS, in respect of all of the interlocutory applications filed on behalf of the petitioner, in resisting the applications filed by the respondent, as well as at hearing of the winding-up petition.

In the affidavit filed in support of the application [encl. (16)], Encik Kok Kon Sang averred that he is conversant with the Companies Act 1965 and Companies Winding-Up Rules 1972, has a good knowledge of the High Court Rules and Court procedures and also held out an order in respect of a winding-up petition which he had moved in his personal capacity as evidence of such knowledge and experience.

The respondent's took issue with Encik Kok's application for the following reasons. According to the affidavit of Encik Tan Cheng Tian affirmed on 5 March 2003 [encl. (24)] the respondent contended that:

(a) the petitioner cannot be represented by an officer of a body corporate in court proceedings;

(b) Encik Kok Kon Sang had no *locus standi* to file an application in his personal capacity on behalf of KCTS as, at the date of filing of encl. (17) on 17 January 2003, KCTS was still represented by Tetuan Nadarajan & Co who at that point in time had not been discharged and was still on record as solicitor for the petitioner.

For these reasons the respondent counsel was of the view that the application was misconceived and urged the court to dismiss Encik Kok's application with costs.

Findings

After careful perusal of the affidavits filed in support and in opposition to the application, and submissions presented by Encik Kok and the respondent's counsel, I dismissed encl. (17) and adjourned the hearing of the other interlocutory applications fixed that day, as well as that of the winding-up petition, to another date pending KCTS appointing another solicitor to act on their behalf. My reasons for doing so are as follows:

Firstly, I am in agreement with the respondent counsel's stand that, for so long as there is counsel on record representing a body corporate, an individual is not authorized to file any application on behalf of that body corporate unless and until the counsel on record for that body corporate has been discharged. Thus, encl. (17) which was filed by Encik Kok Kon Sang on 17 January 2003, in his personal capacity, purportedly on behalf of KCTS when Tetuan Nadarajan & Co was still on record as solicitors acting for the petitioner, was clearly misconceived. On this ground alone I am of the view that this court is entitled to dismiss the application in encl. (17) in limine.

Further, in proceedings before the High Court involving a body corporate, O. 5 r. 6 of the Rules of the High Court 1980 ("RHC") expressly provides that a body corporate "may not begin or carry on any such proceedings otherwise than by a solicitor". It would therefore appear that the rules does not contemplate for a body corporate to sue "in person" nor appear "in person", as, being an artificial entity, it cannot attend and argue "personally". According to the rules, the right of audience before the High Court in respect of a body corporate is necessarily limited to counsel who had been instructed on that body corporate's behalf. Thus, as the law stands, the managing director of a body corporate cannot substitute his persona to that of the company of which he is a director.

In these circumstances I hold that Encik Kok cannot appear as a solicitor or counsel on behalf of KCTS. The fact that Encik Kok is conversant with the relevant laws and rules pertaining to winding-up and has had previous experience in conducting a winding-up case in his personal capacity is accordingly neither here nor there. It in no way confers upon him the necessary *locus standi* to represent and appear for a body corporate before a High Court.

For the abovementioned reasons I accordingly dismissed encl. (17). Be that as it may, in the exercise of my discretion, I thought it appropriate not to follow the general rule of costs following the event and did not penalise Encik Kok in respect of the costs of the application in encl. (17). I then directed that there be no order as to costs.

The hearing of the other interlocutory applications [encls. (3), (11) and (12A)] and the winding-up petition [encl. (1)] was then adjourned pending KCTS appointing a new solicitor to act on their behalf.